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IN THE

Supreme Court of the United States

October Term, 1963

No. 803

DALLAS SELLS and
COMMITTEE ON POLITICAL
EDUCATION, *Appellants*,

v.

MATTHEW WELSH, as Governor of
The State of Indiana and as a Member
of the Indiana Revenue Board,
JAMES C. COURTNEY, as Revenue
Commissioner of the State of Indiana,
EDWIN K. STEERS, as Attorney
General of the State of Indiana,
ROBERT HUGHES, Treasurer of The
State of Indiana, and
DOROTHY GARDNER, Auditor of The
State of Indiana, as Members of the
Indiana Revenue Board, and
INDIANA DEPARTMENT OF STATE
REVENUE, *Appellees*.

On Appeal from the Supreme Court of Indiana

MOTION TO DISMISS OF APPELLEES MATTHEW WELSH AND JAMES C. COURTNEY

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Appellees Matthew E. Welsh, as Governor of the State of Indiana and as a Member of the Indiana Revenue Board,

and James C. Courtney, as Revenue Commissioner of the State of Indiana, respectfully move this Court to dismiss the appeal herein taken by Appellants Dallas Sells and Committee on Political Education from the Supreme Court of Indiana, upon the ground that the appeal does not present a substantial federal question.

This is an appeal from a decision of the Supreme Court of Indiana holding the Indiana Gross Retail Tax and Use Tax Act, imposing general sales and use taxes (Ch. 30, Acts 1963 Spec. Sess., Burns' Ind. Stat. Ann. § 64-2651 et seq.), valid except in certain particulars not relevant here.

By questions 1 and 2 presented by their Jurisdictional Statement, Appellants urge that rights guaranteed them by the due process clause of the 14th Amendment were infringed by the refusal of the Supreme Court of Indiana to permit the introduction of parol testimony and to consult legislative journals for the purpose of ascertaining that the act in question was not passed by "a majority of all members elected to each House" as required by Article 4, Section 25 of the Constitution of Indiana.

The underlying substantive questions which Appellants sought to have determined by the Supreme Court of Indiana were:

> 1. Whether the long standing rule that a house of the General Assembly, once it has enacted a bill by a constitutional majority, may approve amendments thereto by simple majority concurrence in amendments made in the other house or in conference (*McCulloch v. State*, 11 Ind. 424 (1859)) does not apply when the amendments are so extensive as to change the substance of the bill.

2. What effect Article 5, Section 21 of the Constitution of Indiana, which permits the Lieutenant Governor to cast the deciding vote in case of a tie in the Senate, has upon the requirement that bills be passed by a majority of all members elected to the Senate, it being impossible to comply with the latter requirement in any case when, as here, a tie vote occurs. (See Opinion on Motion for Leave to File Amended Petition for Rehearing and For Stay, App. C to Jurisdictional Statement)

Obviously, had the Supreme Court of Indiana decided these questions, which involve purely the construction of the Constitution of Indiana, its decision, either way, would present no issue reviewable by this Court. Yet Appellants claim that the refusal of that court to inquire as to the manner in which the Act was passed and to determine that it was adopted in violation of the Indiana Constitution somehow presents a federal constitutional question.

It is apparent from the opinion of the Supreme Court of Indiana that its decision on this point was based upon adherence to the principle that "the proper authentication of an enrolled act is proof of its proper enactment, with the exception that fraud practiced upon the legislature or its presiding officers would vitiate the certification. * * * No fraud of that character is charged in this case." See opinion of the Supreme Court of Indiana, Appellants' Jurisdictional Statement, Appendix A, page x. Judicial refusal to go behind the certifications of the presiding officers of the houses of the General Assembly to inquire as to the procedures by which the legislature adopted a statute dates, in Indiana, from the carefully considered decision in *Evans v. Browne*, 30 Ind. 514 (1869), wherein it was held that even the journals of the legislature would

not be examined to impeach an authenticated act. Consistent adherence to the rule is evidenced by the statement of the Court and the authorities cited by it in *State ex rel. Cline v. Schricker*, 228 Ind. 41, 46-7, 88 N. E. (2d) 746, 748 (1949):

"Since the decision in *Evans, Auditor v. Browne* (1869), 30 Ind. 514, *supra*, this court has consistently held that a proper authentication of an enrolled act is conclusive, as a matter of law, that the act was duly passed in conformity to the constitution. *Bender v. State* (1876), 53 Ind. 254; *Board of Commissioners of Madison County v. Burford* (1883), 93 Ind. 383; *Stout v. Board of Commissioners of Grant County* (1886), 107 Ind. 343, 8 N. E. 222; *Hovey, Governor v. State ex rel. Carson* (1889), 119 Ind. 395, 21 N. E. 21; *State ex rel. Board of Commissioners of Benton County v. Boice* (1895), 140 Ind. 506, 39 N. E. 64, 40 N. E. 113; *Western Union Telegraph Co. v. Taggart, Auditor* (1895), 141 Ind. 281, 40 N. E. 1051; *Lewis v. State* (1897), 148 Ind. 346, 47 N. E. 675; *State ex rel. Colbert v. Wheeler* (1909), 172 Ind. 578, 89 N. E. 1, *supra*. This is a rule of substantive law and not of evidence, and there is no pleading known to the law by which the existence of an act can be put in issue and tried as a question of fact. *Evans, Auditor v. Browne* (1869), 30 Ind. 514, *supra; State ex rel. Colbert v. Wheeler* (1909), 172 Ind. 578, 89 N. E. 1, *supra; McCulloch v. State* (1858), 11 Ind. 424; *Hovey, Governor v. State* (1889), 119 Ind. 395, 21 N. E. 21, *supra*.

"Nor may this court examine into a charge of fraud committed by the General Assembly or the members thereof. 'The judiciary, for constitutional reasons and

> upon the grounds of public policy, have invariably declined to inquire into the motives which prompted the official acts of the legislature or of the executive; and courts will not hear and determine a charge of fraud and corruption to annul or to supply legislative action. *State ex rel. Ketcham v. Terre Haute & Indianapolis Railroad Co.* (1906), 166 Ind. 580, 583, 584, 77 N. E. 1077. See also *McCulloch v. State* (1858), 11 Ind. 424, *supra.*"

See also, *Mogilner v. Metropolitan Plan Comm.*, 236 Ind. 298, 321, 140 N. E. (2d) 220, 231 (1957).

The rule, although not uniformly observed, is not unique to Indiana. See 82 C.J.S. Statutes, Sec. 83 and cases there collected. It is, indeed, the same rule which this Court observes in respect to acts of Congress (See *Marshall Field & Co. v. Clark*, 143 U. S. 649 (1892), relying, in part, upon *Evans v. Browne, supra; Leser v. Garret*, 258 U. S. 130, 137 (1922)) and to those of territorial legislatures, *Harwood v. Wentworth*, 162 U. S. 547, 562 (1896). The continuing vitality of the rule was recently recognized in *Baker v. Carr*, 369 U. S. 186, 214 (1962). This same rule is applied by the federal courts in respect to state statutes in the absence of contrary state authority. See *Ames v. Union Pacific Ry.*, 64 Fed. 165 (D. Neb., 1894), aff'd sub nom.: *Smyth v. Ames*, 169 U. S. 466, mod. on other grounds, 171 U. S. 361.

It is inconceivable that in following a rule of judicial restraint so firmly established and widely observed, the Supreme Court of Indiana offended the requirements of the 14th Amendment.

As their question 3 Appellants assert that Sec. 4(b) (1) of the Act (Burns' Ind. Stat. § 64-2654(b)(1)) violates the

equal protection clause of the 14th Amendment to the Constitution of the United States in exempting the following transactions from tax:

> "Sales to farmers and other persons occupationally engaged in the business of producing food and commodities for human, animal or poultry consumption either for sale or for further use in producing such food and commodities for sale, of animal and poultry life to be used by the purchaser for such production of food and commodities, feed for such animals and poultry, and seeds, plants, fertilizers, fungicides, insecticides and other tangible personal property to be used for such production of food and commodities."

No substantial federal question is presented by this claim. This Court has consistently held that the federal constitution does not compel states to adopt an "iron rule of equal taxation, nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings, or occupations." *Brown-Forman Co. v. Commonwealth of Kentucky*, 217 U. S. 563, 572 (1918). See also, e.g., *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232 (1890); *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283 (1898); *Quong Wing v. Kirkendall*, 223 U. S. 59 (1912); *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527 (1931); *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495 (1937); *Walters v. St. Louis*, 347 U. S. 231 (1954); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522 (1959).

All the 14th Amendment requires is that states proceed on a rational basis in establishing classifications for purposes of taxation. If a classification rests upon any reasonable consideration of policy, and is not purely arbitrary,

there is no denial of equal protection of the laws. *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573 (1910); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 527 (1959).

Without question, the classification established by Sec. 4(b)(1) is reasonable and bears a direct relation to the object of the legislation. The Indiana tax, like virtually all sales taxes, is designed to reach the ultimate retail transaction of sale and purchase and to avoid placing multiple taxes upon the sale of a single product by exempting from taxation sales of products for resale or for use in the production of other products which will ultimately be sold in taxable retail transactions. The tax is expressly imposed only upon "transactions of retail merchants constituting selling at retail." (Burns' Ind. Stat. § 64-2651; Appendix D, Appellant's Jurisdictional Statement, p. xxxiv.) It is doubtful that Section 4(b)(1) was even necessary to prevent imposition of the tax upon the transactions described since that section simply establishes that the sale of certain enumerated products to farmers and others similarly occupationally engaged for use in the production of food and commodities for sale or further use does not constitute "selling at retail." The subsequent sale of the food and commodities themselves will instead produce the taxable event. Thus, this section is entirely consistent with the basic purpose of the Act—to tax the ultimate retail transaction only. It is to be noted that the exemption extends only to sales of items to be used in further production and does not exempt farmers or others as a class from paying the tax upon true retail transactions.

Appellants admit on pages 17-18 of their Jurisdictional Statement that the Supreme Court of Indiana expressly interpreted Sec. 4(b)(1) as exempting wholesale sales only. Appellants' claim that Section 4(b)(1) is invalid rests

entirely upon the contention that this interpretation is "fallacious" and that the real effect of the section is to exempt *retail* sales to farmers. This contention is wholly without substance. This Court is, of course, bound by the construction given the section by the Supreme Court of Indiana. *Jones v. Prairie Oil & Gas Company*, 273 U. S. 195 (1927). As construed by that court, this section violates no federal right.

The reasonableness of the classification in Sec. 4(b)(1) is confirmed by examination of other retail sales tax acts. Thirty-one such statutes have provisions which, like Sec. 4(b)(1), specifically exempt sales of certain products for use by a farmer or similarly occupied individual in the production of agricultural commodities. See:

Alabama (Ala. Code T. 51 § 786 (34));
Arkansas (Ark. Rev. Stat. § 84-1904 (r));
California (Cal. Revenue and Taxation Code § 6358);
Connecticut (Conn. Gen. Stat. § 12-412 (e));
Colorado (Col. Rev. Stat. § 128-6-14(6)(8));
District of Columbia (D. C. Code, § 47-2605 (i));
Florida (Flor. Stat. § 212.08(6));
Georgia (Ga. Code Ann. § 92-2150.3(c)(2)(b));
Iowa (Iowa Code Ann. § 422.42(3));
Kansas (Kan. Gen. Stat. § 79-3602(k));
Kentucky (Ky. Rev. Stat. § 139.480 (4-7));
Louisiana (La. Rev. Stat T. 46 § 305);
Maine (Maine Rev. Stat. Ch. 17 § 10 (VII));

Maryland (Md. Code Art. 81, § 36);

Michigan (Mich. Comp. Laws § 205.59 a(f));

Mississippi (Miss. Code § 10116(b));

Missouri (Mo. Rev. Stat. § 144.030(21));

Nevada (Nev. Rev. Stat. § 372.280);

New Mexico (N. Mex. Stat. § 72-16-4.5);

North Carolina (N. Car. Gen. Stat. § 105-164.13);

North Dakota (N. Dak. Rev. Code § 56-39-03(8));

Oklahoma (Okla. Stat. Art. 13, § 1312(a));

Pennsylvania (Pa. Stat. Ann. § 3407-102(o));

South Carolina (S. Car. Code § 65-1404 (3-5));

Tennessee (Tenn. Code § 67-3012);

Texas (Tex. Rev. Civ. Stat. Art. 20.04(M));

Utah (Utah Code Ann. § 59-15-2(f));

Washington (Wash. Rev. Code § 82.04.330);

West Virginia (W. Va. Code Ch. 11, Art. 15, § 9(8));

Wisconsin (Wis. Stat. Ann. § 77.54(3));

Wyoming (Wyo. Stat. § 39.287(f)).

All these statutes recognize that transactions of the kind exempted by Section 4(b)(1) of the Indiana Act are not the retail sales upon which the tax is levied. This is the precise significance of Sec. 4(b)(1), as interpreted by the Indiana Supreme Court. Clearly, the exemption of such transactions does not involve a denial of equal protection of the laws to anyone.

No federal question of substance having been presented, the appeal should be dismissed.

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